Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1236

FRANK L. CARSON, LAWRENCE HATCHER, and STUART E. MINES,

Petitioners,

v.

AMERICAN BRANDS, INC., t/a THE AMERICAN TOBACCO COMPANY; LOCAL 182, TOBACCO WORKERS INTERNATIONAL, TOBACCO WORKERS INTERNATIONAL UNION,

Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1263

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FRANK L. CARSON, LAWRENCE HATCHER,
and STUART E. MINES,

Petitioners,

v.

AMERICAN BRANDS, INC., t/a THE AMERICAN TOBACCO COMPANY; LOCAL 182, TOBACCO WORKERS INTERNATIONAL, TOBACCO WORKERS INTERNATIONAL UNION,

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Petition for Certiorari to the United States Court of Appeals for the Fourth Circuit

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ARGUMENT

RESPONDENTS DO NOT STATE ANY SUBSTANTIAL REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED

Respondents have advanced in their brief three arguments in opposition to petitioners'

request for a writ of certiorari. First, they assert that no case or controversy exists within the meaning of Article III of the Constitution. Second, they claim that there is no conflict between the circuits on the issues presented by the petition. Third, they argue that the appealability of the district court's order as a collateral order, under the exception to 28 U.S.C. § 1291 which this Court formulated in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), was neither presented below by the parties not decided below by the Court of Appeals for the Fourth Circuit. Each of these contentions is frivolous and without any merit whatsoever.

With respect to respondents' claim that no case or controversy is presented by these proceedings, the facts show that respondents opposed the appeal of the district court's order to the Fourth Circuit and presently oppose petitioners' request to have this Court grant a writ of certiorari. Moreover, respondents seek to withdraw from the proposed consent decree and, if successful, to contest, at trial, petitioners' subsequent efforts to establish the truth of the allegations of the complaint. Indeed, respondents' opposition to the grant of a writ of certiorari, as well as

their opposition to the appeal below, was simply a means employed to effectuate withdrawal from stipulation to enter into a consent decree. In light of these facts and the additional fact that the stipulation, like any contractual arrangement, is binding if judicially sanctioned,[1/] the controversy between the parties is sufficiently acute, concrete, and potentially damaging to the parties' legal rights and interests, to satisfy the case or controversy standard and to satisfy the standing requirement. See Flast v. Cohen, 392 U.S. 83, 94-103 (1968); Association of Data Processing Service Organization v. Camp., 397 U.S. 150, 151-154 (1970); Warth v. Seldin, 422 U.S. 490, 498-501 (1975); Duke Power Co. v. Carolina Environmental Study Group., 438 U.S. 59, 70-82 (1978).

Respondents cite this Court's decision in Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47 (1971) in support of their contention that the petition should be dismissed

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1/ District courts do not have unlimited discretion in approving or disapproving class action settlements. See Flinn v. FML Corporation, 528 F.2d 1169 (4th Cir. 1975), cert. denied, 424 U.S. 967 (1967); Patterson v. Newspaper & Mail Del. U. of N.Y. & Vic., 514 F.2d 767 (2nd Cir. 1975), cert. denied, 427 U.S. 911 (1976).

for lack of a case or controversy. In Moore, however, this Court found that there was an absence of a case or controversy because both parties had urged the court to hold the applicable anti-busing statute constitutional. Here, by contrast, the opposing parties have taken opposing sides on the issue of the appealability of the district court's order. Furthermore, the parties have differing views on whether the consent decree is capable of enforcement against respondents. Thus, a controversy exists between petitioners and respondents. To the extent that respondents' argument rests on a more general premise that settlement proposals per se preclude a case from satisfying the case or controversy requirement, the premise conflicts with Rule 23(e) of the Federal Rules of Civil Procedure. Moreover, the argument fails to give recognition to the ancillary character of settlement proceedings. Worse, it would, if given the scope contended for by respondents, remove the judiciary entirely from any role in settling cases and controversies. Thus, respondents' argument reduces to an absurdity and shows that this case is no less a case or a controversy because the parties have attempted to settle it.

Respondents' further contention that a conflict does not exist between the circuits on the question of the appealability of a district court's order refusing approval of a proposed consent decree, has been answered by petitioners in their petition for a writ of certiorari. The opinion of the Fourth Circuit shows plainly, respondents' contentions to the contrary notwithstanding, that the Fourth Circuit regarded its decision herein as being in accordance with that of the Second Circuit in Seigal v. Merrick, 590 F.2d 35 (2nd Cir. 1978) and in conflict with that of the Ninth Circuit in Norman v. McKee, 431 F.2d 769 (9th Cir. 1970), cert. denied, ISI v. Meyers, 401 U.S. 912 (1971).

Respondents' final argument is that the appealability of the district court's order as a collateral order was not argued below[2/] or decided by the Fourth Circuit.[3/] Neither allegation is true. A review of the Supplemental Reply Memorandum submitted by petitioners in the Fourth Circuit shows clearly that petitioners

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2/ See Brief in Opposition to Petition for Writ of Certiorari, at 20-21.

3/ Id. at 2, 13, 20-21.

argued in that court that the district court's order was appealable as an exception to 28 U.S.C. § 1291 under the collateral order doctrine expounded in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).[4/] Respondents' argument to the contrary is totally frivolous.

4/ In petitioners' Supplemental Reply Memorandum submitted before the Fourth Circuit, it was alleged by petitioners that:

> In their supplemental memorandum, defendants contend that the district court's order rejecting the proposed settlement in this action is appealable neither as a final order under 28 U.S.C. § 1291 nor as an order refusing an injunction under 28 U.S.C. § 1292(a)(1). Relying on Seigal v Merrick, ___ F.2d ___, 47 U.S.L.W. 2418 (2nd Cir., Dec. 14, 1978), defendants argue that the district court's order here does not meet the "collateral order doctrine" of Cohen v. Beneficial Indus. Loan Corp. (citations omitted) . . . .
>
> At the outset, plaintiffs point out that the holding in Seigal with respect to 28 U.S.C § 1291 would only be pertinent were this not a case involving a district court's order refusing an injunction. As the Court recognized in Seigal, there is a conflict among the circuits as to whether the disapproval of a proposed settlement in a stockholding derivative suit is appealable as a collateral order under 28 U.S.C § 1291.

Respondents are similarly in error in alleging that the Fourth Circuit did not decide the issue of the appealability of the collateral order doctrine to the judgment below. What respondents overlook, in their assertion is that the Fourth

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4/ cont'd.

> See Norman v. McKee, 431 F.2d 769 (9th Cir. 1970), cert. denied, 401 U.S 912 (1971). Neither Cohen nor Seigal involved any discussion of injunctive relief or possible jurisdiction under 28 U.S.C. § 1292(a)(1). Because the case at bar does involve the refusal of injunctions, an independent basis for appeal under 28 U.S.C § 1292(a)(1) is present. It is for this reason that plaintiffs stated in their supplemental memorandum that Seigal is inapplicable to this case.
>
> Were it not for the refusal of injunctive relief, this Court would be faced with the difficult task of choosing between the holding of the Second Circuit in Cohen and the holding of the Second Circuit in Seigal. Because the district court's order rejecting the settlement here is an "interlocutory order of the district court" . . . refusing . . . injunction, "that question need not be reached, and this Court should entertain this appeal under 28 U.S.C. § 1292(a)(1)."

Appellants' Supplemental Reply Memorandum at 1-3.

Circuit conducted its extended discussion of the Second Circuit's opinion in Seigal v. Merrick, 590 F.2d 35 (2d Cir. 1978) and of this Court's opinion in Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), for the sole purpose of determining the appealability of § 1291 and the collateral order doctrine to the district court's judgment below. See Part IV of the Fourth Circuit's opinion, App. 6a-8a. Indeed, no other explanation could exist for the Court's extended discussion since appealability under § 1291 was the main issue which was raised in those two cases. Thus, appealability under § 1291 was both argued and determined below.

CONCLUSION

For the reasons set forth herein, petitioners request that their petition be granted.

Respectfully submitted,

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